Supreme Court, U.S.
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In The

Supreme Court of the United States

GLORIA ALLRED and ALLRED, MAROKO & GOLDBERG,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF CONTRA COSTA,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA, and DEFENDANT SCOTT EDGAR DYLESKI,

Real Parties in Interest.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it violates the First Amendment for a trial court to issue an order in a criminal case preventing an attorney representing a non-party witness from making public statements about a pending case, including from discussing the conduct of government officials who violated her client's rights and from commenting on matters in the public domain.

CORPORATE DISCLOSURE STATEMENT

Allred, Maroko & Goldberg is a privately held professional corporation. None of its shares is held by a publicly traded company.

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OPINIONS BELOW

A copy of the unpublished order of the Court of Appeal of the State of California, First Appellate District, denying the writ of mandate/prohibition and the request for a stay, dated January 12, 2006, is included in the Appendix to this Petition for Certiorari at page 1 (hereafter "App."). A copy of the unpublished Protective Order of the Superior Court of the State of California, for the County of Contra Costa, dated November 21, 2005, is included at App. 2. A copy of the unpublished decision of the Superior Court of the State of California, for the County of Contra Costa, dated November 21, 2005, is included at App. 3. A copy of the unpublished order of the Supreme Court of California denying review, dated March 15, 2006, is included at App. 5.

STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §1257, this Court has jurisdiction to review the decision of the California Court of Appeal of the State of California, denying a writ of mandate/prohibition and a stay, following the denial of discretionary review by the Supreme Court of California on March 15, 2006.

CONSTITUTIONAL PROVISION INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition

the Governmer r redress of grievances." U.S. Const., amend. I.

STATEMENT OF THE CASE

This case raises the profoundly important question of when courts may place gag orders on lawyers, preventing them from speaking to the press about pending cases and even from commenting on the wrong-doing of government officials and matters of public concern. Specifically, the issue before this Court concerns the constitutionality of a prior restraint imposed on an attorney representing a potential witness, keeping the lawyer from speaking to the press or the public about the case and the conduct of the police and prosecutors handling it. The trial court imposed this order without any findings that the speech posed a clear and present danger or a substantial likelihood, or even a reasonable likelihood, of materially prejudicing the adjudicatory proceedings.

The trial court's gag order was issued in the case of *People v. Dyleski*, No. 3-219113-8, now pending in the Superior Court of the State of California, for the County of Contra Costa. On October 15, 2005, Pamela Vitale, the wife of a prominent criminal defense attorney, was killed. On October 21, 2005, the District Attorney for Contra Costa County filed a criminal complaint in Superior Court against Scott Edward Dyleski for the murder of Pamela Vitale.

In late October 2005, Gloria Allred and her firm were retained by a potential witness in the *Dyleski* case. Ms. Allred is a well known California attorney, both for the

many cases she has handled and for her regular appearances on television to offer commentary on various legal matters. On numerous occasions, Ms. Allred and her law firm have represented potential witnesses in criminal actions, including several high-profile homicide cases. For example, Ms. Allred represented Amber Frey, a witness in the widely publicized Scott Peterson murder trial.

On October 24, 2005, Ms. Allred contacted the District Attorney's office on behalf of her client, a minor, and informed Deputy District Attorney Richard Jewett that her client may be a potential witness in the case. Prior to Ms. Allred's call to the District Attorney, neither the police nor the prosecutor had contacted Ms. Allred's client. Ms. Allred and Mr. Jewett agreed to meet on October 27, 2005 to discuss her client's potential testimony.

To her surprise, however, the next morning, on October 25, 2005, Ms. Allred was informed that her client's residence was being searched by the police and that her client had been subpoenaed to appear to provide testimony for the criminal case before a grand jury later that day.[1]

Ms. Allred contacted Mr. Jewett and requested that the grand jury testimony be postponed to the following day to give her the opportunity to fly to Northern California so

[1] Petitioners contend that the government used abusive tactics with respect to their client and that the police engaged in excessive use of force when they searched the home, including pointing a gun at a family member who had done nothing wrong. [Ex. 21; RT at 26:16-24 (included as part of the Appendix filed with the California Court of Appeal in seeking the writ of prohibition and mandate and stay of the Protective Order)]. Petitioners' objection to the trial court's gag order, in part, is based on their apparently being prevented even from discussing this misconduct by the police.

that she could meet with her client and accompany her client, a minor, to the grand jury. Ms. Allred wished to be able to wait outside the grand jury and be available to confer with her client should her client so desire. The District Attorney refused Ms. Allred's request.

On or about October 26, 2005, counsel for the defendant moved for a "gag order" to restrict public statements about this action by the police and prosecution. The District Attorney promptly joined the defendant's motion and requested that the protective order apply to defense counsel and also to attorney Gloria Allred and her law firm who were representing a potential witness.

On the following day, October 27, 2005, the trial court heard arguments and issued a broad gag order. The court later issued an amended protective order that specifically included counsel for potential witnesses. Petitioners filed their request to modify or set aside the protective order on November 8, 2005. The San Francisco Chronicle also filed a motion to vacate the interim protective order.

On November 21, the trial court issued a revised Protective Order. App. at 3. The trial court also issued a "Decision Granting in Part and Denying in Part Motions for Protective Order." App. at 5. The Protective Order applies to "[t]he Office of the District Attorney, those investigating the case on behalf of the People, the Defendant, counsel for Defendant, those investigating the case on behalf of Defendant, Judicial Officers and Court Staff, Sworn Peace Officers and Public Officials, and those who have been advised that they might be material witnesses in the matter or who have appeared and testified at either a preliminary examination or a grand jury investigating

the matter, *and all agents, attorneys, or other representatives of such witnesses*, from making any out-of-court statement" concerning many different aspects of the case. App. at 3 (emphasis added).

Specifically, the gag order said that these individuals could not make out-of-court statements as to any of the following:

> "1. The nature, source, substance or effect of any purported evidence alleged to have been accumulated or to exist in regard to this matter.
>
> 2. The existence, or possible existence, of any document, exhibit or other physical evidence, the admissibility of which may have to be ruled on by the court.
>
> 3. Any opinion or public comments as to the weight, value or effect of any evidence as tending to establish either guilt or innocence.
>
> 4. The identification or possible existence of any other person that might be alleged to have committed or participated in the commission of the subject crime.
>
> 5. The identification of any potential witness to the crime, or his probable testimony."

App. at 4.

The Protective Order further provides that it does not restrict public statements regarding various matters, including "the result of any stage of the judicial proceeding held in open court." App. at 4.

The trial court issued a Decision accompanying its Protective Order. The trial court's opinion stated a number of "Findings." Specifically, the trial court's findings were:

> "1. This court finds that this matter has generated an extraordinary amount of pretrial publicity; an amount, in fact, very rarely seen in the murder of an individual. . . .
>
> 2. The atmosphere thus far in this proceeding has been highly charged leading to an environment that, if continued, makes it difficult at best to keep courtroom decorum and preserve a fair trial. . . .
>
> 3. The nature of the case is such that an early termination of this publicity, without court intervention, appears unlikely. . . .
>
> 4. Although no court proceeding in this matter has yet included *any* evidence either as to the defendant (other than his age) or as to any motive for the killing, there have been numerous public statements as to both."

App. at 7-8.

The trial court made no findings that statements by Ms. Allred posed a substantial likelihood, or even a reasonable likelihood, of materially prejudicing the adjudicatory proceedings. The trial court refused to specify what Ms. Allred could or could not say because it did not want to "give an advisory opinion regarding future communications." App. at 11. Nonetheless, the trial court said that Ms. Allred, as counsel for a potential witness, may not "preview the evidence that might be provided by, or known to, the witness." App. at 11.

Petitioners believed that the Protective Order when read in connection with the Decision is vague and ambiguous as to whether Ms. Allred is prohibited from making comments on certain issues. Accordingly, on November 29,

2005, Petitioners filed a request for clarification of the Protective Order. The trial court denied the request for clarification on December 5, 2005.

On January 11, 2006, Petitioners filed a petition for a writ of mandate or prohibition in the California Court of Appeal for the First District. On January 12, 2006, the Court of Appeal summarily denied the writ petition without explanation. App. at 1.

On January 23, 2006, Petitioners filed a petition for review in the Supreme Court of California. On March 15, 2006, the Supreme Court of California denied review, with Justice Kennard expressing the opinion that the petition should be granted. App. at 2.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE, WHICH HAS DIVIDED THE FEDERAL AND STATE COURTS, CONCERNING WHETHER AND WHEN GAG ORDERS MAY BE IMPOSED ON ATTORNEYS PREVENTING THEIR SPEECH ABOUT PENDING CASES.

In virtually every high profile case, it is now routine for trial courts to issue broad gag orders preventing attorneys, parties, and witnesses from making public statements. *See* Douglas E. Mirrell, *Gag Orders and Attorney Disciplinary Rules: Why Not Base the Former Upon the Latter*, 17 Loy. L.A. Ent.L.J. 353, 367 (1997) (describing "the increasing frequency with which courts are imposing or threatening to impose gag orders upon

trial participants"); Sheryl A. Bjork, *Indirect Gag Orders and the Doctrine of Prior Restraint*, 44 U. Miami L. Rev. 165, 176 (1989) (describing "a proliferation of orders restraining trial participants").

Such court orders preventing speech are classic prior restraints. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) ("court orders that actually forbid speech activities – are classic examples of prior restraints" because they involve a "true restraint on future speech.") Injunctions are regarded as prior restraints because that is exactly what they are: a prohibition of future expression. As this Court noted, injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764 (1994).

This Court, of course, long has declared that prior restraints on speech constitute "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Injunctions against speech are "the very prototype of the greatest threat to First Amendment values." *Madsen v. Women's Health Center, Inc.*, 512 U.S. at 792-94 (Scalia, J., concurring in judgment in part and dissenting in part). Injunctions are "the product of individual judges rather than of legislatures – and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman." *Id.* at 793.

Prior restraints on attorneys' speech concerning pending cases are particularly troublesome because of the importance of expression about criminal proceedings. As Justice Kennedy explained: "The judicial system, and in

particular our criminal justice courts, play a vital role in a democratic state, and the public has a legitimate interest in their operations. . . . It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted. . . . Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (Kennedy, J., dissenting) (citations omitted).

Although gag orders on lawyers, parties, and witnesses raise profoundly important First Amendment issues, and even though they are increasingly common, this Court never has considered their constitutionality. Nor has the Court ever articulated a legal standard for when, if at all, such prior restraints are permissible. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), this Court considered gag orders *on the press* and strongly disapproved of such prior restraints except in extraordinary circumstances on a showing that pretrial publicity posed a significant risk to providing a fair trial, that no other alternatives could succeed, and that the gag order was likely to be effective. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), this Court considered when lawyers may be punished *after* speaking and upheld allowing attorneys to be disciplined for speech that presents a substantial likelihood of materially prejudicing an adjudicatory proceeding. Neither *Nebraska Press* nor *Gentile* considered the constitutionality of gag orders placed on attorneys' speech in pending cases. No Supreme Court case ever has considered this.

In the absence of guidance from the Supreme Court, the circuits and the state courts have developed quite

different standards as to whether and when gag orders on the speech of attorneys, parties, and witnesses are permissible. Indeed, three conflicting approaches have emerged, with some circuits and states following each. As a federal district court recently explained: "A three-way circuit split exists with respect to ... the threshold standard for imposing a prior restraint." *United States v. Carmichael*, 326 F.Supp.2d 1267, 1293 (D.Ala. 2004).

First, some courts have held that gag orders on lawyers' speech about pending cases are allowed only if there is a clear and present danger of harm. These courts have essentially articulated a strict scrutiny test, emphasizing the need for a compelling interest and requiring that the gag order be the least restrictive alternative. For example, the Sixth Circuit in *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975), invalidated a gag order imposed on counsel, court personnel, parties, and parties' relatives, friends, and associates. The court explained that the gag order was invalid because it constituted a prior restraint on freedom of speech and there was no showing that it was required to obviate serious and imminent threats to the fairness and integrity of the pending matter. The court said that "[t]he restraint, to meet judicial approval, must pose a clear and present danger, or a serious or imminent threat to a protected competing interest." *Id.* at 238.

Similarly, in *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987), the Sixth Circuit affirmed that gag orders on parties to a lawsuit must meet strict scrutiny. The court explained: "[T]he Supreme Court [has] held that the *Near* [*v. Minnesota*, 283 U.S. 697 (1931)] standard applies to restraints on the press in criminal cases. We see no legitimate reasons for a lower threshold standard for individuals, including defendants, seeking to express themselves

outside of court than for the press." 830 F.2d at 598. The court explained that a gag order must meet "the clear and present danger test." *Id.* at 600. The court stated: "Such a threat must be specific, not general. It must be much more than a possibility or a 'reasonable likelihood' in the future. It must be a 'serious and imminent threat' of a specific nature, the remedy for which can be narrowly tailored in an injunctive order." *Id.*

The Seventh Circuit, too, has said that there must be more than a reasonable likelihood that comments will interfere with a fair trial. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975) (reasonable likelihood standard "does not meet constitutional standards.") The Seventh Circuit, though not using the words "clear and present danger," articulated an approach much like it in concluding that gag orders on lawyers are permissible only if "[there is] a 'serious and imminent threat' of interference with the fair administration of justice." *Id.*

The Ninth Circuit also has used the clear and present danger test and held that gag orders on lawyers and trial participants are permissible only to prevent specific serious and imminent threats of harm. For example, in *Levine v. United States*, 764 F.2d 590 (9th Cir. 1985), the court noted that gag orders on lawyers are prior restraints and "may be upheld only if the government establishes that: (1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected compelling interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available." *Id.* at 595.

A number of states also follow the clear and present danger test used by the Sixth, Seventh, and Ninth

Circuits. In *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 244 (Ill. 1986), the Illinois Supreme Court invalidated a gag order and declared: "[A] trial court can restrain parties and their attorneys from making extrajudicial comments about a pending civil trial only if the record contains sufficient specific findings by the trial court establishing that the parties' and their attorneys' conduct poses a clear and present danger or a serious and imminent threat to the fairness and integrity of the trial. Further, any restraining order which denies parties and counsel their first amendment rights in the interest of a fair trial must be neither vague nor overbroad." *See also Twohig v. Blackmer*, 121 N.M. 746, 749 (1996) (invalidating a gag order on lawyers using the "clear and present danger" test).

In sharp contrast, other circuits and states have taken a second approach, allowing gag orders on lawyers and trial participants so long as there is a "reasonable likelihood of harm," exactly the standard that the Sixth and Seventh Circuits expressly rejected. *United States v. Ford*, 830 F.2d at 598; *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 249 (reasonable likelihood standard is not sufficient to meet the requirements of the First Amendment). The reasonable likelihood standard is far more tolerant of gag orders than the clear and present danger approach.

The Second Circuit, for example, upheld a gag order on lawyers and trial participants and declared: "To decide whether the pretrial publicity justified the order, the standard by which to measure justification is whether there is a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial." *In re Application of Dow Jones & Co.*, 842 F.2d 603, 610 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988). Three Justices dissented from the denial of

certiorari in this case and expressly noted the conflict between the "reasonable likelihood" approach taken by the Second Circuit and the "clear and present danger" test used in other circuits. Justice White, with whom Justices Brennan and Marshall joined in dissenting, stated: "[T]he Second Circuit's adoption of a 'reasonable likelihood' standard conflicts with the Sixth Circuit's 'clear and present danger' standard. Because of the importance of this issue and the conflicting resolutions given it by the courts of appeals, I would grant the petition for certiorari." 488 U.S. at 948.

The conflict has continued and intensified over the last two decades. Several courts have followed the Second Circuit's lead and taken the "reasonable likelihood" approach. For example, the Fourth Circuit has rejected both the clear and present danger test and the "substantial likelihood" test, discussed below, and concluded that "the 'reasonable likelihood' standard is sufficiently narrowly tailored to pass constitutional muster" in allowing gag orders on attorneys' speech about pending cases. *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999).

The Tenth Circuit, too, has adopted the reasonable likelihood standard for when gag orders may be imposed on lawyers and other trial participants. In *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969), the court upheld a gag order on parties and lawyers, and the resulting contempt convictions for violating the prior restraint. The court expressly adopted the "reasonable likelihood" approach and rejected the clear and present danger standard. The court stated: "We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must

exist before a trial court can forbid extrajudicial statements about the trial." *Id.* at 666.

A number of state courts have followed the approach used in the Second, Fourth, and Tenth Circuits and have held that gag orders on lawyers and trial participants are permissible so long as there is a "reasonable likelihood" of prejudice to adjudicatory proceedings. *See State v. Bassett*, 128 Wash.2d 612, 616 (1996) ("Under the First Amendment, this means that no restriction is permissible unless the court finds there is at least a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial."); *National Broadcasting Co. v. Cooperman*, 116 A.D.2d 287, 292 (N.Y. App. Div. 1986) ("We are in agreement with the view that extrajudicial statements of attorneys may be subject to prior restraint by a trial court upon a demonstration that such statements present a 'reasonable likelihood' of a serious threat to a defendant's right to a fair trial.")

Yet a third approach has been taken by some courts, a middle position between the clear and present danger standard and the reasonable likelihood test. This approach allows gag orders on lawyers and trial participants if a court finds a "substantial likelihood" that speech could pose a threat to fair adjudicatory proceedings. The substantial likelihood test is obviously more speech protective than the reasonable likelihood approach, but more tolerant of gag orders than the strict scrutiny represented by the clear and present danger test.

The Third Circuit, for example, found a gag order on a former lawyer in a proceeding unconstitutional and concluded that "it is reasonable to apply the 'substantial likelihood of material prejudice' standard announced in *Gentile* to this case." *United States v. Scarfo*, 263 F.3d 80,

94 (3d Cir. 2001). Similarly, the Fifth Circuit approved a "substantial likelihood" test and expressly rejected the clear and present danger test. In *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000), the court upheld a gag order imposed on attorneys, parties, and witnesses. The court noted that "[o]ur sister circuits have not reached a consensus on this question" of when gag orders are constitutionally permissible. *Id.* at 425. After reviewing the varying approaches taken by the different circuits, the Fifth Circuit stated: "In sum, we conclude that in light of *Gentile*, 'clear and present danger' cannot be the appropriate standard by which we evaluate gag orders imposed on trial participants. Instead, the standard must require a lesser showing of potential prejudice." *Id.* at 428. The court concluded: "If the district court determines that there is a 'substantial likelihood' (or perhaps even a 'reasonable likelihood,' a matter we do not reach) that extrajudicial commentary by trial participants will undermine a fair trial, then it may impose a gag order on the participants, as long as the order is also narrowly tailored and the least restrictive means available." *Id.*

Thus, three distinct, conflicting approaches have emerged among the federal circuits. The Sixth, Seventh, and Ninth Circuits allow gag orders on lawyers only if there is a clear and present danger to providing a fair adjudicatory proceeding and essentially require that strict scrutiny be met. The Second, Fourth, and Tenth Circuits allow gag orders if there is a reasonable likelihood of prejudice. The Third and Fifth Circuits allow gag orders if there is a substantial likelihood of materially prejudicing an adjudicatory proceeding. As explained above, state courts are likewise split among these approaches. The uncertainty in the law and the willingness of so many

courts to impose gag orders on lawyers undoubtedly has a chilling effect on speech about the legal system.

In issuing the Protective Order in this case, the Superior Court used the "reasonable likelihood" test. App. at 7. At the very least, it is clear that the order issued by the Superior Court could not survive under either the clear and present danger test or the substantial likelihood approach. There was no finding by the trial court, nor could there be, that Ms. Allred's comments to the press could pose a clear and present danger or a substantial likelihood of causing harm to a fair trial. The trial judge seemed concerned about overall trial publicity. His response was to place a gag on Gloria Allred and others even though there was absolutely no evidence that she had made any improper comments in this case and even though she had never been gagged in the past despite representing many witnesses in high-profile criminal cases.

The only "evidence" that the trial court used to justify the gag order were copies of pages from the Internet of stories regarding the case which the District Attorney submitted to the trial court. At the time of the hearing, the District Attorney filed "Exhibit A" with the court which consisted of numerous pages from the internet containing news reports about the *Dyleski* case. [Ex. 22; App. at 152-245]. However, none of these internet pages contain any quotations from Ms. Allred regarding the facts of the case.

The Superior Court based its Protective Order entirely on the existence of a great deal of publicity surrounding the *Dyleski* trial. But this Court has been clear that publicity alone cannot justify a prior restraint: "[P]retrial publicity, even if pervasive and concentrated, cannot be

regarded as leading automatically and in every kind of criminal case to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 565.

Thus, it is highly questionable whether there was sufficient evidence to allow a judge to find a reasonable likelihood that Ms. Allred's comments would harm a fair trial, let alone a substantial likelihood or a clear and present danger. This Court should grant review to offer desperately needed clarification as to whether and when such gag orders are permissible.

This case presents a particularly compelling vehicle to resolve this conflict among the circuit and state courts. First, the attorney in this case, Ms. Allred, was representing a potential witness and not a party. The trial court never explained why Ms. Allred should be treated in the same manner as counsel for the parties. Unlike counsel for the parties, Ms. Allred is not privy to any inside information about the case or its evidence, apart from her client's potential testimony and she already had agreed not to comment on that. She does not have access to pretrial discovery and has not seen the files of either counsel for the prosecution or defense.

Second, the order entered by the trial court in this case is both overbroad and vague. This Court has explained that an injunction "issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). But the order issued by the trial court in this case is not narrowly tailored. It prohibits Ms. Allred from offering

"any opinion or public comments as to the weight, value or effect of any evidence as tending to establish guilt or innocence." There is no reason why Ms. Allred should not be able to engage in public commentary unrelated to her client's potential testimony, including offering her opinions about other evidence or witnesses. With respect to potential witnesses other than her own client, Ms. Allred is in the same position as any other public commentator and should have the same speech rights.

The overbreadth of the gag order in this case is especially apparent in that according to the District Attorney, petitioners are prohibited from making out of court statements critical of the actions of the prosecution or the police, including the actions of the police that were harmful to their client and her family. [Ex. 27; App. at 261-62]. Petitioners believe that the prosecution has acted in an abusive manner with respect to petitioners' client, a potential witness in the case. Even though the client, through her attorney, voluntarily offered to meet with the prosecution to discuss what she knew, the police showed up at her house the following day in force with guns drawn. The manner in which petitioners' client was mistreated by the prosecution and the police should be open to public discussion and debate. Speech critical of the government misconduct "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). But under the District Attorney's reading of the Protective Order, any public statement by petitioners which criticized the actions of government officials and accused them of misconduct with respect to petitioners' client, a potential witness, would be a violation of the Protective Order. [Ex. 27; App. at 262].

There can be no justification for such a sweeping protective order. The District Attorney seeks to use the broad terms of the protective order to stifle Ms. Allred's justifiable criticism of him and the actions of his office. Indeed, the type of speech which the District Attorney seeks to squelch is deserving of the highest constitutional protections. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. at 1034-35 (citation omitted) (Kennedy, J., dissenting) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment. [The State] seeks to punish the dissemination of information relating to alleged governmental misconduct, which . . . we described as 'speech which has traditionally been recognized as lying at the core of the First Amendment.'"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) ("It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.")

At the very least, the order is unduly vague in that it is unclear whether and to what extent Ms. Allred may comment on the conduct of the police and prosecutors in this case. The trial court refused to say, indicating that it did not want "to give an advisory opinion regarding future communications." App. at 11. The result is that Ms. Allred cannot know from the order what is permissible and what is forbidden.

CONCLUSION

In high profile trials across the country, it is now common for judges to issue gag orders preventing speech

by attorneys, parties, and witnesses. Because this Court never has addressed the constitutionality of such orders, a significant split of authority has developed among courts across the country as to whether and when there may be such prior restraints on speech. This Court should grant review to resolve this uncertainty and to clarify a crucial aspect of First Amendment law.

Respectfully submitted,

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COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

GLORIA ALLRED, ET AL.,
Petitioners,
vs.
SUPERIOR COURT COUNTY OF CONTRA COSTA,
Respondent,
THE PEOPLE, ET AL.,
Real Parties in Interest.

A112615
Contra Costa County No. 032191138

BY THE COURT:

The petition for writ of mandate/prohibition and the request for stay are denied. The justices participating in this matter were:

Acting Presiding Justice Stein, Justice Swager and Justice Margulies.

Date: JAN 12 2006 STEIN, J. P.J.

App. 2

Court of Appeal, First Appellate District,
Division One – No. A112615
S140816

IN THE SUPREME COURT OF CALIFORNIA

En Banc

GLORIA ALLRED et al., Petitioners,

v.

SUPERIOR COURT CONTRA
COSTA COUNTY, Respondent;

THE PEOPLE et al., Real Parties in Interest.

(Filed Mar. 15, 2006)

Petition for review DENIED.

Kennard, J., is of the opinion the petition should be granted.

George, C.J., was absent and did not participate.

MORENO
Acting Chief Justice

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE OF CALIFORNIA, No. 3-219113-8

vs. PROTECTIVE ORDER

SCOTT EDGAR DYLESKI,

Defendant. / (Filed Nov. 21, 2005)

IT IS HEREBY ORDERED AS FOLLOWS:

The Office of the District Attorney, those investigating the case on behalf of the People, the Defendant, counsel for the Defendant, those investigating the case on behalf of the Defendant, Judicial Officers and Court staff, Sworn Peace Officers and Public Officials, and those who have been advised that they might be material witnesses in the matter or who have appeared and testified at either a preliminary examination or a grand jury investigating the matter, and all agents, attorneys or other representatives of such witnesses, shall refrain from making any out-of-court statement as to any of the following:

1. The nature, source, substance or effect of any purported evidence alleged to have been accumulated or to exist in regard to this matter.

2. The existence, or possible existence, of any document, exhibit or other physical evidence, the admissibility of which may have to be ruled upon by the court.

3. Any opinion or public comment as to the weight, value or effect of any evidence as tending to establish either guilt or innocence.

4. The identification or possible existence of any other person that might be alleged to have committed or participated in the commission of the subject crime.

5. The identification of any potential witness to the crime, or his or her probable testimony.

Nothing herein shall prohibit any of the following:

1. The defendant, or those acting upon his behalf, from unequivocally asserting his innocence of the crime of which he is accused.

2. Factual statements of an accused person's name, age, residence, occupation, educational status or family identification.

3. The date, time and place of the arrest of an accused.

4. The nature, substance and text of the charge and a description of its parameters.

5. The scheduling and result of any stage of the judicial proceeding held in open court.

6. Any witness discussing any matter in connection with the case with any attorney representing either the People or the Defendant, or investigators on their behalf, or an attorney from whom they might seek legal advice.

Dated: November 21, 2005

/s/ [Illegible]
Judge of the Superior Court

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR
THE COUNTY OF CONTRA COSTA

THE PEOPLE OF THE STATE
OF CALIFORNIA,

vs. No. 3-219113-8

SCOTT EDWARD DYLESKI,

Defendant. /

DECISION GRANTING IN PART AND DENYING IN PART MOTIONS FOR PROTECTIVE ORDER

(Filed Nov. 21, 2005)

The Court having previously taken under submission the above-entitled matter, the Court now issues its decision upon the matter as follows. For the reasons set forth herein, the court will issue a narrowly drawn protective order in this matter.

Firstly, neither the prosecution nor the defense seeks as order that in any way prohibits the public, including the media, from attending all court proceedings in this matter, reporting them as they see fit, or from otherwise including in news or other coverage any reference to facts or opinions that have legally come to their attention. It cannot be seriously denied, however, that virtually all court decisions interpreting the constitutional mandate of freedom of speech and of the press recognize the power of the courts to, under some circumstances, enter protective orders which place limitations upon public commentary by those persons involved in pending litigation matters. See *Sheppard v. Maxwell* (1966) 384 U.S. 333, 359 and *Nebraska Press Assn v. Stuart* (1976) 427 U.S. 539, footnote

27. Indeed, the court has been held to have a *duty* to place such limitations. As was stated in *Farr v. Pitchess* (9th circ. 1976) 522 F.2nd 464:

> "In a criminal case the trial judge has a duty and obligation to attempt to protect the right of the defendants to a fair trial, free of adverse publicity. Where the case is a notorious one, that burden on the court is heavy. The most practical and recommended procedure to insure against dissemination of prejudicial information is the entry of an order directing that attorneys, court personnel, enforcement officers and witnesses refrain from releasing any information which might interfere with the right of the defendant to a fair trial."

When, and under what circumstances, such limitations should be placed has always been a matter of grave concern for the courts. The concern centers upon the possible conflict between the sixth amendment right to a fair trial and the first amendment rights of freedom of speech and of the press. One court referred to this as "the frequently recurring conflict between the media and the judiciary, the two institutions pedestaled in fragile loneliness by the Constitution." *Brian W. v. Superior Court* (1978) 20 Cal. 3rd 618.

It is often the case, as it is in the instant proceedings, that there exists a dispute as to just what burden must be met before a "gag order" of any sort is placed by the court. Some urge that a "clear and present danger" must be established while others urge that a lesser standard can be imposed. In *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, a 5 to 4 majority of the United States Supreme

Court upheld the test of "a substantial likelihood of material prejudice" to be adequate, at least as to orders relating to attorneys.

In *Younger v. Smith* (1973) 30 Cal. App. 3rd 138, 162 the court appears to put this alleged 'difference' in standards of proof aside, commenting that "a reasonable likelihood of an unfair trial is, in itself, a clear and present danger to the administration of justice."

Findings

1. The court finds that this matter has generated an extra-ordinary amount of pretrial publicity; an amount, in fact, that is very rarely seen in the instance of a murder of one individual.

> It is perhaps ironic that in a time when the Internet has become for many a primary news source the internet itself, with its extensive indexing capabilities, allowed the parties seeking a protective order to show the geographic depth of interest in this matter. This search indicates publicity throughout both the state and the country as well as coverage on CourtTV and MSNBC. Such renders the possible remedy of change of venue to be of minor significance.

2. The atmosphere thus far in this proceeding has been highly charged leading to an environment that, if continued, makes it difficult at best to keep courtroom decorum and preserve a fair trial.

> The vast majority of courtroom seats are taken at each hearing with representatives of the media. A reading of the press coverage of the matter, as provided in Exhibit A, shows a general

approach to any news on the matter that virtually presumes that the defendant is guilty of the crime with which he is charged.

3. The nature of the case is such that an early termination of this publicity, without court intervention, appears unlikely.

The matter arose in an unusual and interest-drawing setting. The husband of the victim, Daniel Horowitz, was at the time of the alleged crime himself in the midst of defending a defendant in a "high profile" murder trial. That trial, People v. Susan Polk, had just recently commenced in another department of this court and was closely followed by the press. The defendant in that action has chosen to give numerous interviews to the media, publicly acknowledging that she killed her husband and contending that she did so in self-defense and in response to "years of abuse" by him. That case, too, has generated nationwide media interest, Mr. Horowitz has recently indicated that he will continue with his representation of Mrs. Polk.

4. Although no court proceeding in this matter has yet included *any* evidence either as to the defendant (other than his age) or as to any motive for the killing, there have been numerous public statements as to both.

Newspaper accounts have described the defendant as a teenager who "wore eccentric, dark Goth clothing", was "ambitious", lived a "dark life", was a "non-conformist", wore "a long trench coat" and even was involved in "devil worship". As to motive it has been reported that the defendant was involved in a "credit-card scam" and that he was buying equipment to "grow marijuana".

That such findings justify the issuance of *some* form of protective order or "gag order" cannot be seriously questioned. This conclusion does not, however, determine the issues raised by the motion for, and opposition to, an order. The more important questions are *who* should be covered by any order and what *type* of commentary should be limited or allowed.

The purpose of a protective order in the current environment is to assure a prospective jury panel, for jury selection, that has not been bombarded with either facts or concepts that make it reasonably unlikely that such can be "put aside" and the case determined solely on the trial evidence. When jurors have been inundated with such things they would seem to create prejudgment that even they might be unaware of. Pretrial publicity, for instance, that a defendant was seen at a crime scene may be something that an ordinary juror might be able to put aside when no evidence of such presence is presented at trial, but the subconscious belief that the defendant is guilty, that arose from the pretrial evidence, may lurk indefinitely.

A bar against "discussing the case", as covered by the court's temporary order, is too broad. A statement that one party of the other is "anxious to get to trial", for instance, would be prohibited by the temporary order, even though is [sic] does not include any such factual matters as might lead a potential juror to pre-judge the case.

The volume of publicity that a case can generate would normally appear to be something beyond the control of the court, and that factor alone should never, under current interpretation of constitutional law, justify a "news blackout".

A review of the orders issued in *Hamilton v. Municipal Court* (1969) 270 Cal. App. 2nd 797, and in the *Busch* case that is one of the three cases covered by *Younger v. Smith* (1973) 30 Cal. App. 3rd 138, supra, provides adequate guidelines as to the order that is reasonably necessary in this matter. In substance, where a trial court finds a homicide case in such a level of publicity as the record reflects in this one, fair comment should be allowed but previewing of evidence, much of which might never be before the jury, must be restrained.

To be effective, any order of the court must not only cover the parties and material witnesses involved in the case, but additionally cover those who act as their agents or spokespersons. Any other order would be of little value, allowing one to simply speak through another person uncovered by the order. Thus, from the prosecution side, it is common to include 'investigators' and 'law enforcement' within the restraint. Court personnel must be included both because certain information coming to them may be unavailable to the public under prevailing law and because their statements could be construed as "authoritative" pronouncements.

The position of Gloria Allred, who joins the opposition to the continuance of the current order, is unique. Ms. Allred is apparently employed or invited from time to time to act as a "commentator" on pending legal proceedings. For the reasons set forth above, the court has no intention of issuing an order that would prevent such persons, when not otherwise involved in the pending case, from commenting as he or she sees fit. In the instant case, however, Ms. Allred has indicated that she has been retained to act a [sic] counsel for an unnamed material witness.

The court does not find it necessary to bar any comment from Ms. Allred, nor to give an advisory opinion regarding any future communications. For one thing that may well constitute an unreasonable prior restraint upon free speech. Insofar as she is an attorney for a material witness, however, she will be subject to the same constraints as any other attorney representing a party or witness; she cannot engage in commentary that the witness herself could not engage in. Any party or witness can comment, for instance, on the wisdom of this court issuing the protective order. Ms. Allred is no exception. Neither the witness nor Ms. Allred, however, may preview evidence that might be provided by, or known to, the witness.

Based upon the foregoing, and consistent therewith, the court is issuing, contemporaneously with the filing of this decision, a limited protective order in these proceedings.

Dated: November 21, 2005

/s/ [Illegible]
Judge of the Superior Court

(2)

Supreme Court, U.S.
FILED

AUG 25 2006

OFFICE OF THE CLERK

No. 05-1505

IN THE SUPREME COURT OF THE UNITED STATES

GLORIA ALLRED, et al.,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY,

Respondent,

STATE OF CALIFORNIA, et al.,

Real Parties in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attorney representing a witness in a high profile criminal trial, in which the court has issued a protective order applicable to all parties, material witnesses, and their attorneys, is exempt from the protective order by virtue of the fact that the attorney offers public commentary on legal matters.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-1505

GLORIA ALLRED, et al.,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY,

Respondent,

STATE OF CALIFORNIA, et al.,

Real Parties in Interest.

STATEMENT OF THE CASE

Real party in interest Scott Edgar Dyleski is currently on trial for murder in Contra Costa County, California. The victim was the wife of a locally prominent criminal defense attorney. Prior to a preliminary hearing, Dyleski moved for a protective order prohibiting the prosecution and law enforcement from discussing this case with the news media. The State joined in the motion and asked to expand the protective order to include anyone connected, directly or indirectly, with the investigation or prosecution. Petitioners Gloria Allred and her law firm are retained counsel for a witness.

The trial court issued a protective order on October 27, 2005, and an amended order on October 28, 2005. Petitioners moved to modify or set aside the order. The court held a hearing on November 16, 2005, and heard argument from defense counsel, the prosecutor, and petitioners. On November 21, 2005, the trial court issued the current protective order supported by

specific findings. Petitioners' request for clarification was denied.

The protective order prohibits "[t]he Office of the District Attorney, those investigating the case on behalf of the People, the Defendant, counsel for the Defendant, those investigating the case on behalf of the Defendant, Judicial Officers and Court staff, Sworn Peace Officers and Public Officials, and those who have been advised that they might be material witnesses in the matter or who have appeared and testified at either a preliminary examination or a grand jury investigating the matter, and all agents, attorneys or other representatives of such witnesses" from making any out-of-court statements concerning:

1. The nature, source, substance or effect of any purported evidence alleged to have been accumulated or to exist in regard to this matter.

2. The existence, or possible existence, of any document, exhibit or other physical evidence, the admissibility of which may have to be ruled upon by the court.

3. Any opinion or public comment as to the weight, value or effect of any evidence as tending to establish either guilt or innocence.

4. The identification or possible existence of any other person who might be alleged to have committed or participated in the commission of the subject crime.

5. The identification of any potential witness to the crime, or his or her probable testimony.

Pet. App. 3-4.

Petitioners opposed the protective order on the ground that it infringes upon the free speech rights of Ms. Allred who has been a public commentator for 30 years.

The trial court rejected petitioners' contention, reasoning as follows:

> The court does not find it necessary to bar any comment from Ms. Allred, nor to give an advisory opinion regarding any future communications. For one thing that may well constitute an unreasonable prior restraint upon free speech.

> Insofar as she is an attorney for a material witness, however, she will be subject to the same constraints as any other attorney representing a party or witness; she cannot engage in commentary that the witness herself could not engage in. Any party or witness can comment, for instance, on the wisdom of this court issuing the protective order. Ms. Allred is no exception. Neither the witness nor Ms. Allred, however, may preview evidence that might be provided by, or known to, the witness.

Pet. App. 11.

On January 12, 2006, the California Court of Appeal denied petitioners' petition for writ of mandate/prohibition. Pet. App. 1. On March 15, 2006, the California Supreme Court denied petitioners' petition for review. Pet. App. 2.

On May 25, 2006, petitioners filed an application for stay of the trial court's protective order. Real parties in interest opposed the application for stay. On May 26, petitioners filed a petition for writ of certiorari. On June 6, 2006, Justice Kennedy denied petitioners' application for stay. On July 20, the Court requested a response to the petition.

The protective order remains in effect. The jury in *People* v. *Dyleski* is currently deliberating.

REASONS FOR DENYING THE PETITION

Certiorari should be denied because the petition seeks review of the mere application to unique facts of a settled rule of law, the petition suggests no basis to conclude that the rule is the subject of any dispute among the nation's courts, the validity of the protective order likely will become moot before this Court might rule on it, the circumstances of this case are unique and are not likely to recur, and the order in any event was proper.

1. The law is settled regarding when the speech of lawyers in pending criminal cases may be restricted. This Court has made clear that "the 'substantial likelihood of material prejudice'

standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1075 (1990) (*Gentile*). Attorneys appearing before a court adhere to a standard different from the "clear and present danger" test applicable to members of the press because attorneys "are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Id.* at 1074. The trial court here applied the correct test in deciding whether to issue the protective order, citing the "substantial likelihood of material prejudice" test of *Gentile*. Pet. App. 6-7. Petitioners quarrel with the result of the trial court's application of that rule to the peculiar facts of this case. But that is an improbable basis for a grant of certiorari. See Sup. Ct. Rule 10.

Petitioners insist, however, that courts have adopted conflicting tests to determine the validity of protective orders restricting the speech of attorneys, parties, and witnesses in pending cases: (1) clear and present danger of harm; (2) reasonable likelihood of harm; and (3) substantial likelihood that speech could pose a threat to fair adjudicatory proceedings. Pet. 10-15. Petitioners urge this Court to grant review to settle the law.

But petitioners are mistaken that a genuine or intolerable conflict exists in the law. A majority of the cases cited by petitioners predate this Court's 1990 decision in *Gentile*. See *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 610 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988); *United States* v. *Ford*, 830 F.2d 596, 598 (6th Cir. 1987); *Levine* v. *U.S. Dist. Court*, 764 F.2d 590, 595 (9th Cir. 1985); *CBS, Inc.* v. *Young*, 522 F.2d 234, 239 (6th Cir. 1975); *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 249 (7th Cir. 1975); *United States* v. *Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969); *NBC* v. *Cooperman*, 501 N.Y.S.2d 405, 408 (N.Y.App.Div. 1986); *Kemner* v. *Monsanto Co.*, 112 Ill.2d 223, 244, 492 N.E.2d 1327, 1337 (1986).

Among the cases cited by petitioner, several decided after *Gentile* acknowledge its holding and apply the correct "substantial likelihood" standard. See *United States* v. *Scarfo*, 263 F.3d 80, 93 (3rd Cir. 2001); *United States* v. *Brown*, 218 F.3d 415, 426-27 (5th Cir. 2000); *Twohig* v. *Blackmer*, 121 N.M. 746, 750-51, 918 P.2d 332, 336-37 (1996). Two post-*Gentile* cases cited by petitioners applied a "reasonable likelihood" test. *In re Morrissey*, 168 F.3d 134, 139 (4th Cir. 1999); *State* v. *Bassett*, 128 Wn.2d 612, 616, 911 P.2d 385, 387 (1996). However, as we explain below, the difference between "substantial likelihood" and "reasonable likelihood" is one of mere semantics in the present context.

Petitioners rely on the dissent of Justice White, joined by Brennan, J. and Marshall, J., from the denial of a petition for writ of certiorari following the Second Circuit's decision in *In re Application of Dow Jones & Co., Inc.*, 842 F.2d 603. The dissent cited a split of authority concerning whether a restraining order directed against the parties and challenged only by the media constitutes a prior restraint on the freedom of expression. 488 U.S. at 947-48. The dissent also stated, "Moreover, the Second Circuit's adoption of a 'reasonable likelihood' standard conflicts with the Sixth Circuit's 'clear and present danger' standard." *Id.* at 948. The dissent, however, was written two years before the decision in *Gentile*.

The three "tests" noted by petitioners reflect more of a difference in semantics than a genuine split of authority. The "clear and present danger" test "was never intended to express a technical legal doctrine or to convey a formula for adjudicating cases." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 842 (1978) (internal quotation marks omitted).

> Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The

> possibility that other measures will serve the State's interests should also be weighed.

Id. at. 842-43.

Although courts have employed different labels for the test to be applied in deciding whether to issue a protective order, there is actually only one test: the trial court must assess the proximity and degree of harm and consider whether there are other less restrictive approaches to insuring a fair trial.

> The difference between the requirement of serious and imminent threat found in the disciplinary rules of some States and the more common formulation of substantial likelihood of material prejudice could prove mere semantics. Each standard requires an assessment of proximity and degree of harm. Each may be capable of valid application.

Gentile, 501 U.S. at 1037 (Kennedy, J., op. for four Justices).

Some courts have expressed the view that the different tests reflect a linguistic rather than a genuine difference, or tended to conflate one test with another. See, *e.g. United States* v. *Brown*, 218 F.3d at 427 (difference between "reasonable likelihood" and "substantial likelihood" is not clear); *CBS, Inc.* v. *Young*, 522 F.2d at 239 (order constitutional under "clear and present danger" or "reasonable likelihood" test); *Twohig* v. *Blackmer*, 121 N.M. at 751, 754, 918 P.2d 332, 337 ("clear and present danger" test differs "semantically" from "substantial likelihood of material prejudice" test; court applied both); *In re Hinds*, 90 N.J. 604, 622, 449 A.2d 483, 493 (1982) ("substantial likelihood of material prejudice" standard is a linguistic equivalent of "clear and present danger"), cited with approval in *Gentile*, 501 U.S. at 1037.

The trial court here recognized that the different labels used did not necessarily signal different tests when it referred to *Younger* v. *Smith*, 30 Cal.App.3d 138, 161, 106 Cal.Rptr. 225, 240 (1973): "[T]he court appears to put this alleged 'difference' in standards of proof aside, commenting that 'a reasonable likelihood of an unfair trial is, in itself, a clear and present

danger to the administration of justice.'" Pet. App. 7.

2. Nor is there any basis to conclude that courts are in conflict over the propriety of the rule or how it would apply in a case such as this one involving a "public commentator." To date, no court has held that a protective order cannot or should not apply to an attorney in a criminal case because that attorney is also a television commentator who wants to speak publicly about the case. The law is clear that, when extensive publicity threatens the fairness of a criminal proceeding, the trial judge should proscribe "extrajudicial statements by any lawyer, party, witness, or court official, which divulge[] prejudicial matters, such as . . . the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case." *Sheppard* v. *Maxwell*, 384 U.S. 333, 361 (1965). The communications of trial participants can be restricted where necessary to ensure a fair trial for a criminal defendant. *Gentile*, 501 U.S. at 1073.

As counsel for a witness, petitioner Allred stands in the same position as her client. She is, therefore, appropriately covered by the protective order. No party or witness can be allowed to frustrate a trial court's protective order by the simple expedient of retaining an attorney to speak on the witness's behalf. That is true whether or not the attorney's retainer extends to discussing the client's testimony.

3. The question presented is whether an attorney who represents a material witness in a high-profile criminal case is exempt from a protective order because she is a media commentator on legal matters. That question is not an important question justifying certiorari. Instead, it presents the unusual situation of an attorney representing a material witness in a high-profile case who asserts she should not be bound by a protective order, applicable to all attorneys and witnesses in the case, because she regularly comments on legal matters on television. This situation is not likely to recur with any frequency and petitioners are the only ones likely to be affected by resolution of the question. See Pet. App. 10 ("The position

of Gloria Allred, who joins the opposition to the current order, is unique.").

4. In addition, the petition should be denied because the trial in *People v. Dyleski* apparently will be completed before a decision is reached in this case. The jury is currently in deliberations.

It is true that, in cases involving protective orders directed at the *media*, this Court has found the case not moot even though the trial had concluded. This Court reasoned that the underlying dispute between the parties is one capable of repetition, yet evading review. *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 6 (1986); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 603 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377 (1979); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 547 (1976). To be "capable of repetition, yet evading review," two conditions must be satisfied: "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that *the same complaining party* would be subjected to the same action again.'" *Gannett Co.* v. *DePasquale*, 443 U.S. at 377 (emphasis added).

Here, no reasonable expectation appears that petitioners will be subjected to the same action again. According to petitioners, petitioner Allred "had never been gagged in the past despite representing many witnesses in high-profile criminal cases." Pet. 16. Given that acknowledgment, no reason exists to find a reasonable expectation petitioners will be subjected to the same action again.

5. Moreover, the trial court's protective order is proper. The trial court made highly specific findings that support it. It found that (1) the case of *People v. Dyleski* had "generated an extraordinary amount of pretrial publicity; an amount, in fact, that is very rarely seen in the instance of a murder of one individual" (Pet. App. 7); (2) the atmosphere so far in the case had been "highly charged leading to an environment that if

continued, makes it difficult at best to keep courtroom decorum and preserve a fair trial" (Pet. App. 7); (3) the nature of the case was such "that an early termination of this publicity, without court intervention, appears unlikely" (Pet. App. 8); and (4) "[a]lthough no court proceeding in this matter has yet included any evidence either as to the defendant (other than his age) or as to any motive for the killing, there have been numerous public statements as to both" (Pet. App. 8).

Newspaper accounts had described Dyleski as a teenager who "'wore eccentric, dark Goth clothing', was 'ambitious', lived a 'dark life', was a 'non-conformist', wore 'a long trench coat' and even was involved in devil worship'." Pet. App. 8. It had been reported that his motive for the killing was his involvement in a credit card scam and that he was buying equipment to grow marijuana. Pet. App. 8.

The trial court further found that publicity about the case had disseminated throughout the state as well as the nation, with coverage on CourtTV and MSNBC. Pet. App. 7. The prosecutor submitted to the trial court 92 pages of exhibits documenting extensive media reports about the case in local newspapers and the national media. "A reading of the press coverage of the matter . . . shows a general approach to any news on the matter that virtually presumes that the defendant is guilty of the crime with which he is charged." Pet. App. 7-8.

The trial court also narrowly tailored the protective order to proscribe only extrajudicial statements that could impact the fairness of trial, and applied it equally to all attorneys and witnesses participating in the case. The order does not ban all discussion of the case but only precludes a preview of the evidence. Pet. App. 9, 11. The protective order is consistent with *Sheppard* v. *Maxwell*, 384 U.S. at 361 ("[T]he trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or

their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case.").

Petitioners argue, "There is no reason why Ms. Allred should not be able to engage in public commentary unrelated to her client's potential testimony, including offering her opinions about other evidence or witnesses." Pet. 18. Petitioner Allred seeks to publicly comment on "[t]he manner in which petitioner's client was mistreated by the prosecution and the police . . . ." Pet. 18.

Petitioner Allred's client is not a party to the case of *People* v. *Dyleski*. It is on that individual's behalf that she seeks to utilize her role as television commentator to influence public opinion about her client, the prosecution, and the police. Petitioner Allred's commentary is likely to carry added weight in the public eye because she would be regarded as an insider to the legal proceedings and because she represents a potentially important witness. *Gentile*, 501 U.S. at 1074 ("Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.").

The trial court did not prevent any television commentator, "when not otherwise involved in the pending case, from commenting as he or she sees fit." Pet. App. 10. The trial court correctly ruled, "Insofar as [petitioner Allred] is an attorney for a material witness, however, she will be subject to the same constraints as any other attorney representing a party or witness; she cannot engage in commentary that the witness herself could not engage in." Pet. App. 11.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Dated: August 28, 2006

Respectfully submitted,

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File date
8/16/06

No. 05-1505

In the Supreme Court of the United States

GLORIA ALLRED AND ALLRED, MAROKO & GOLDBERG,
PETITIONERS,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA,
RESPONDENT,

THE PEOPLE OF THE STATE OF CALIFORNIA, AND SCOTT EDGAR DYLESKI,
REAL PARTIES IN INTEREST

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

In a criminal case that is receiving intensive media coverage prior to trial, by what standard may a court protect the defendant's Sixth Amendment right to a fair trial with a protective order that bars a witness's attorney from public comment upon the guilt or innocence of the defendant or upon evidence in the public record that is not the result of a court proceeding?

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Constitutional Provisions Involved

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . .

U.S. Const, art. III, § 2.

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const, amend. I.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

U.S. Const., amend. VI.

> No state shall . . . deprive any person of life, liberty, or property without due process of law . . . .

U.S. Const., amend. XIV.

Statement of the Case

On October 19, 2005, Scott Dyleski (then sixteen years old) was arrested and charged with murdering the wife of Daniel Horowitz, a nationally-renowned attorney and television legal commentator. Mr. Horowitz was at the time involved in a high-profile, criminal trial. Mr. Dyleski's case immediately received intense media attention. Local, national, and international press reports contained information ostensibly leaked by law enforcement officers and witnesses. All of the reports presumed Mr. Dyleski to be guilty and many were quite inflammatory. Mr. Dyleski's court appearances were packed with spectators; people lined up outside the courtroom before it was open; many were turned away.

On October 26, 2005, prior to trial, the defendant brought a motion for a protective order, seeking to prohibit the prosecution and law enforcement from discussing the case with the news media. The district attorney joined that motion and asked that the protective order extend to the district attorney's office, the sheriff's office, the public defender's office, the law offices of a private attorney who initially represented Mr. Dyleski, and the offices of Petitioner Allred.

The *San Francisco Chronicle*, as well as Petitioner Allred, opposed the motion. Ms. Allred represented a witness who at the time had not been identified publicly. In her opposition to the motion, Ms. Allred represented that she had no intention of publicly commenting upon her client's potential testimony in this matter or "any matters that are not part of the public record." Opposition to Proposed Imposition of a Gag Order Upon Gloria Allred, 9:19-20, Oct. 27, 2005. Nonetheless, Ms. Allred sought to simultaneously

represent the witness in these proceedings and to provide public commentary on these same proceedings.

On October 27, 2005, the trial court made the following factual findings:

1. There has been an extra-ordinarily high amount of pretrial publicity in this matter prior to this date, when arraignment on the charges is just occurring.

2. There is a reasonable likelihood that continued dissemination of information about the case, by the parties or their attorneys or material witnesses, would make it difficult to impanel an impartial jury in the matter.

3. The request for a "gag" order justifies the court hearing the matter upon an emergency basis, provided that all those affected are given the right, upon reasonable notice, to be heard before the order involves more than a temporary period of time.

Protective Order, 1:17-2:1, Oct. 27, 2005. Based on these findings, the trial court issued the following preliminary order:

> [U]ntil further order of this Court, the Office of the District Attorney, those investigating the case on behalf of the People, the Defendant, counsel for the Defendant, Court staff, those who might be material witnesses in the matter, or attorney [sic] or other representatives of such material witnesses, shall refrain from discussing this case, the evidence expected to be used in the case, or the issues in the case, the merits of the case, or trial tactics or strategy, with the media or in an otherwise public fashion.

Id., 2:2-9. The trial court also invited briefing and set a further hearing on the motion for a protective order.

Ms. Allred was personally served with a copy of that protective order immediately after the hearing. Declaration of Harold W. Jewett, 2:9-11, Oct. 28, 2005. Immediately after receiving a copy of the court's order, Ms. Allred made comments to the press in front of the courthouse, including the statement that "I represent a young client who is a potential witness." *Id.* at 2:14-16. That evening, Ms. Allred appeared on

a Fox News program and was interviewed regarding the case. *Id.* at 2:18-3:5. Based on these actions, the next day the district attorney moved the court to modify the protective order to include Ms. Allred by name. Ex Parte Application for Modification of Protective Order, Oct. 28, 2005. In response, the trial court issued an amended protective order, which added a clause to make it applicable to "attorneys of persons that might be potential witnesses" (Amended Protective Order, Oct. 28, 2005) and faxed it to Ms. Allred together with a letter stating the court's intention that the order apply to Ms. Allred (Ltr. from Hon. David B. Flinn to Gloria Allred, Oct. 28, 2005).

Prior to the hearing on the motion for a protective order, Mr. Dyleski's case was the subject of coverage that included CNN, MSNBC, Fox News, ABC News, CBS News, NBC News, Court TV, *USA Today*, *People* Magazine, *The New York Times*, the AP wire, *The Los Angeles Times*, *The Atlanta Journal-Constitution*, Reuters, *The Dallas Morning News*, *The Austin American-Statesman*, the New Orleans *Times-Picayune*, and New York *Newsday*. Fox News covered the case in depth on at least five different shows, including *The Lineup*, *Day Side*, and *Big Story Weekend*. The Fox News program *The O'Reilly Factor* covered the case at least five times prior to the hearing on the protective order, and *On the Record with Greta Van Susteren* covered the story almost daily. The coverage by local newspapers and television was more extensive, each outlet often including several stories per day.

At the hearing on the motion, Ms. Allred's counsel opposed a broad order, but represented that she did not seek to reveal evidence in advance of trial.

> [MR. GOLDBERG:] There's no reason to believe that Ms. Allred doesn't understand that the People and the defendant are entitled to a fair trial. There's no reason to believe that she doesn't understand that she can't and won't, and has indicated in her declaration has not and will not, preview

> the testimony or comment about what the witness is going to say about a specific piece of evidence. She wouldn't do that. She understands that that would not be something that would be – that would be reasonable to do in a case of this nature, and she wouldn't do that.
>
> But to say a blanket restriction, say, "You can't talk about anything to do with the case," that's just way too far. It's a prior restraining of speech, and it's political speech, your Honor, and it prevents her not only from talking about the case, it prevents her from talking about if there's police abuse concerning her client, prevents her from doing that. It prevents her from talking about whatever happens, doesn't happen, or how the grand jury process might have been misused in this case. Prevents her from talking about anything to do with the case. Prevents her from defending in any manner --

R.T., 29:24-30:16, Nov. 16, 2005.

After the hearing, the trial judge did not issue a "blanket restriction." The order at issue here is limited to talking about the evidence. And it is limited to out-of-court statements.

> [Specified persons] shall refrain from making any out-of-court statement as to any of the following:
>
> 1. The nature, source, substance or effect of any purported evidence alleged to have been accumulated or to exist in regard to this matter.
>
> 2. The existence, or possible existence, of any document, exhibit or other physical evidence, the admissibility of which may have to be ruled upon by the court.
>
> 3. Any opinion or public comment as to the weight, value or effect of any evidence as tending to establish either guilt or innocence.
>
> 4. The identification or possible existence of any other person that might be alleged to have committed or participated in the commission of the subject crime.
>
> 5. The identification of any potential witness to the crime, or his or her probable testimony.

Protective Order, 2:1-13, Nov. 21, 2005; Petition for Writ of Certiorari, App. 3-4.

Moreover, specifically excluded from the coverage of the order are six classes of statements. The protective order provides:

> Nothing herein shall prohibit any of the following:
>
> 1. The defendant, or those acting upon his behalf, from unequivocally asserting his innocence of the crime of which he is accused.
>
> 2. Factual statements of an accused person's name, age, residence, occupation, educational status or family identification.
>
> 3. The date, time and place of the arrest of an accused.
>
> 4. The nature, substance and text of the charge and a description of its parameters.
>
> 5. The scheduling and result of any stage of the judicial proceeding held in open court.
>
> 6. Any witness discussing any matter in connection with the case with any attorney representing either the People or the Defendant, or investigators on their behalf, or an attorney from whom they might seek legal advice.

Protective Order, 2:15-3:3, Nov. 21, 2005; Petition for Writ of Certiorari, App. 4. Only the fifth and sixth categories would be applicable to Ms. Allred, but the fifth category permits her to comment publicly about any aspect of a proceeding in open court that may be fairly characterized as the "result."

Furthermore, the order places no limits on what Ms. Allred or anyone else may say in court. And the order places no limits on media coverage of the court proceedings.

Ms. Allred sought a writ of mandate in the California Court of Appeal. Her petition was summarily denied. She petitioned for review in the California Supreme Court. That petition, too, was denied. Ms. Allred then petitioned for certiorari in this Court.

Accompanying her petition for certiorari was a request for a stay of the trial court's order. Mr. Dyleski filed an opposition to the request for stay. That request for stay was denied.

Mr. Dyleski filed in this Court a waiver of the right to file a response to the petition for writ of certiorari. On July 20, 2006, however, this Court asked Mr. Dyleski to file opposition to the petition for writ of certiorari. The instant opposition is filed in compliance with that request.

On July 17, 2006, immediately prior to this Court's request for briefing, the jury trial commenced.

Reasons for Denying the Petition

1. The instant case is a poor vehicle for resolving the split among the lower courts.

Ms. Allred urges this Court to grant certiorari because there is a three-way split among state and federal courts regarding the standard applicable in a case such as this.. Petition for Writ of Certiorari, 10. "[S]ome courts have held that gag orders on lawyers' speech about pending cases are allowed only if there is a clear and present danger of harm." *Id.* "[O]ther circuits and states have taken a second approach, allowing gag orders on lawyers and trial participants so long as there is a 'reasonable likelihood of harm,' . . . ." *Id.* at 12. "Yet a third approach . . . allows gag orders on lawyers and trial participants if a court finds a 'substantial likelihood' that speech could pose a threat to fair adjudicatory proceedings." *Id.* at 14. Given that the trial judge in the instant case applied the highest standard, the standard that Ms. Allred urges upon this Court, it does

not appear that the instant case would be the most appropriate vehicle for reviewing this split of authority.

On page 2 of her Petition, Ms. Allred states: "The trial court imposed this order without any findings that the speech posed a clear and present danger, or a substantial likelihood, or even a reasonable likelihood, or materially prejudicing the adjudicatory proceedings." On page 16 of her Petition, she reverses field and asserts: "In issuing the protective Order in this case, the Superior Court used the "reasonable likelihood test." Neither of these is a fair reading of the trial judge's ruling. *Cf.* Rules of the Supreme Court of the United States, Rule 15.2.

In his order, Judge Flinn cites *Gentile v. State Bar of Nevada* and *Younger v. Smith* as providing the applicable standards.

> It is often the case, as it is in the instant proceedings, that there exists a dispute as to just what burden must be met before a "gag order" of any sort is placed by the court. Some urge that a "clear and present danger" must be established while others urge that a lesser standard can be imposed. In *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, a 5 to 4 majority of the United States Supreme Court upheld the test of "a substantial likelihood of material prejudice" to be adequate, at least as to orders relating to attorneys.
>
> In *Younger v. Smith* (1973) 30 Cal.App.3d 138, 162, the court appears to put this alleged 'difference' in standards of proof aside, commenting that "a reasonable likelihood of an unfair trial is, in itself, a clear and present danger to the administration of justice."

Decision Granting in Part and Denying in Part Motions for Protective Order, 2:23-3:7, Nov. 21, 2005; Petition for Writ of Certiorari, App. 6-7. Judge Flinn's order then makes findings of fact regarding what had unfolded with respect to media coverage so far. *Id.* at 3:9-5:4; Petition for Writ of Certiorari, App. 7-8. Then the trial judge makes a statement

that can only reasonably be interpreted as meaning that, regardless of the standard, a protective order is justified in the instant case.

> That such findings justify the issuance of *some* form of protective order or "gag order" cannot be seriously questioned.

Id. at 5:6-7. Petition for Writ of Certiorari, App. 9.

It is disingenuous of the Petitioner to claim that Judge Flinn made no finding that the speech posed a clear and present danger. Rather, the trial judge applied the law to his findings of fact to hold, in effect, that under either the standard of "a substantial likelihood of material prejudice" or the standard of "a clear and present danger," a protective order of some kind was justified. Applying the law to the facts is a question of law and doesn't call for a finding, per se. The judge was not required to resolve the question of the applicable standard because the judge ruled that under either standard a protective order was justified.

Because the trial judge effectively applied the standard that Petitioner Allred seeks in this Court, this is not an appropriate case in which to resolve the question of whether a lower standard would have been sufficient.

2. Because the trial court applied the standard sought by Petitioner, Petitioner lacks standing to seek resolution of the question presented.

Article III of the United States Constitution limits the jurisdiction of this Court to "cases" and "controversies." U.S. Const, art. III, § 2. Among the doctrines delineating that limitation is the doctrine of "standing."

> Art III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," . . . , and that the injury

> "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," . . . .

Valley Forge College v. Americans United, 454 U.S. 464, 472 (1982) (citations omitted). It is the last of these three requirements that is not met in the instant case.

Because the trial court applied the standard sought by Ms. Allred—holding that under any of the proposed standards the facts justified a protective order—a decision favorable to Ms. Allred in this Court would not bring a different result in the court below. Accordingly, under Article III, this Court is without jurisdiction.

3. The issue in the instant case is narrow.

Although the protective order at issue in the instant case has five numbered paragraphs specifying topics that may not be the subject of out-of-court statements, they are all fairly subsumed within the first sentence. The order prohibits the specified persons from discussing, outside of court, the "nature, source, substance or effect of any purported evidence."

In every courthouse in America, on every day that court has been in session since the founding of the Republic, attorneys, witnesses, and other citizens have been subjected to prior restraint of their speech regarding the evidence in criminal cases. These restraints are embodied in the rules of evidence and procedure that govern those proceedings. These rules severely restrict what may be said regarding the evidence in the presence of jurors or potential jurors.

Similarly, if an attorney, a witness, or another citizen were to walk out of the courtroom and into a hallway crowded with potential jurors and make statements

regarding the evidence, admissible or inadmissible, that would be regarded as misconduct of the highest order, perhaps prosecutable as embracery. (*E.g.*, Cal. Pen. Code § 95.)

> To what extent may a prosecutor, a defense attorney, or an attorney in a civil case be prohibited from arguing outside the courtroom to an actual juror or potential juror, . . . ? In considering the question, suppose that a defense attorney, in court and prior to empaneling the jury, moves to have a certain piece of evidence suppressed, . . . and the motion is granted. And now suppose that, in opening argument, the prosecuting attorney informs the jury that nine kilograms of crack cocaine were found in the defendant's bedroom. The prosecutor further informs the jury that a motion to suppress this evidence had been granted so that, unfortunately, the jury would be hearing nothing more about this evidence.
>
> Now we all know what would happen to the trial and the prosecutor at this point were this to happen. And we know as well what would happen if the prosecuting attorney were to claim a denial of his or her First Amendment right to speak to the jury—unmitigated laughter. And if this is so, then there is once again a serious question about why the issue is so different—why an argument that would be thought frivolous quickly becomes a serious First Amendment claim just because the physical locus of the speech is outside the courthouse walls, given that the substance of the restriction and the motivations behind it are virtually identical.

Fredrick Schauer, *The Speech of Law and the Law of Speech*, 49 Ark. L. Rev. 687, 693-94 (1977). *See also*, Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. Rev. 705 (2004).

There are times when the level of media attention on a case reaches a level of saturation such that statements made to the press are tantamount to statements made in that hallway crowded with potential jurors. It is understood among commentators that words said to the media can influence the course of trial.

> A commentator's words may also matter to the participants in a case. . . . Trial participants sometimes use commentary to guide what arguments or strategies they will present in court. While heard outside the courtroom, a commentator's voice can nonetheless have an impact inside the trial.

Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator II*, 37 Santa Clara L. Rev. 913, 917 (1997). And it is also understood among commentators that statements to the media can influence the course of a case prior to trial.

> Prominent civil rights attorney Gloria Allred has suggested that "[t]he press . . . provides leverage in cases that are publicly embarrassing to the opposition." Allred remarked: "'By convincing the defense that the matter will be on the front page many more times, a plaintiff's lawyer can raise a case's settlement value' and hasten its conclusion."

Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 Emory L.J. 859, 870 (1998), *quoting* Robert S. Weider, *How to Manipulate the Media: Twenty Timeless Tips for When the Press Comes Calling*, in Fifth Annual Litigation Management Supercourse, at 541, 545 (PLI Litig. & Admin. Practice Course Handbook Series, No. 497, 1994).

Once a jury has been selected, sequestration orders or prophylactic orders to the jury to avoid news regarding the case may serve to insulate the jury from such prejudicial statements. Prior to the selection of the jury—which was the posture of the case at the time that the trial court considered the motion for a protective order at issue in the instant case—no such remedies are available.

In the instant case, Ms. Allred seeks to perform the dual role of, in court, an attorney representing a witness and, on television, a commentator regarding the proceeding. Such a dual role involves a conflict of interest that should result in per se disqualification from one role or the other.

> Many conflicts will not require the complete disqualification of a legal commentator from covering a case. Some will only require the commentator to refrain from commenting on certain issues. However, there are some types of conflicts that could lead to complete disqualification. For example, per se disqualification should be imposed

> when the lawyer has been counsel on the case or is currently serving as counsel for any party or witness related to the case.

Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. Cal. L. Rev. 1303, 1333-34 (1996).

Ms. Allred argued that the district attorney was seeking her disqualification in the instant case. Opposition to Proposed Imposition of a Gag Order, 5:20-24, Oct. 27, 2005. And the trial judge expressed concern about Ms. Allred wearing these "two hats." R.T., 29:1-9, Nov. 16, 2005. But Judge Flinn did not impose disqualification. Nor did the trial court bar Ms. Allred from commenting about the case at all. Rather, the order is narrowly tailored to reach statements regarding evidence that has not been presented in open court. The protective order permits Ms. Allred to comment upon what actually happened in court. She may not comment on the inferences to be drawn regarding guilt or innocence. But it does not preclude comment upon any other inferences that might be drawn regarding evidence presented in court. And the order does not preclude commenting on the litigation strategies or effectiveness of either counsel so long as Ms. Allred's comments do not go to drawing inferences of guilt or innocence.

To the trial court, Ms. Allred represented that she does not seek to "preview the testimony or comment about what the witness is going to say about a specific piece of evidence." R.T., 29:26-30:2, Nov. 16, 2005. And she does not seek to comment upon any matters that are not part of the public record. Opposition to Proposed Imposition of a Gag Order Upon Gloria Allred, 9:19-20, Oct. 27, 2005. Accordingly, those aspects of the trial court's order are not in issue. Furthermore, the protective order does not prohibit Ms. Allred from discussing the results of any proceeding so long as she does not draw inferences regarding guilt or innocence.

Thus, at issue, is whether in advance of the selection of a jury Ms. Allred has a First Amendment right to comment on the guilt or innocence of Mr. Dyleski, and to discuss evidence in the public record that is not fairly characterized as the result of a proceeding. Or, to be more precise, the issue presented is whether in advance of the selection of a jury the First Amendment protects such public statements by an attorney in the proceeding, notwithstanding the intensity of the news coverage in the instant case and notwithstanding the defendant's Sixth Amendment right to a fair trial.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 16th day of August, 2006.

Respectfully submitted,

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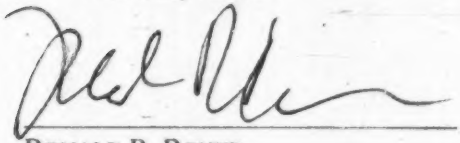

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No. 05-1505

In the Supreme Court of the United States

GLORIA ALLRED AND ALLRED, MAROKO & GOLDBERG,
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SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA,
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PROOF OF SERVICE

I, Ronald R. Boyer, do swear or declare that on this date, August 16, 2006, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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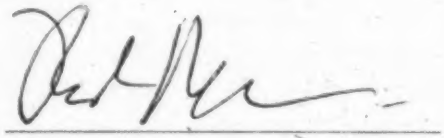
I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 2006.



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August 16, 2006

Clerk
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Washington, DC 20543

Re: *Allred v. Superior Court*
No. 05-1505

Dear Sir or Madam:

Enclosed please find an original and twelve copies of a Motion for Leave to Proceed *In Forma Pauperis* and an attached Opposition to Petition for a Writ of Certiorari in the above-entitled case. Please file the original and ten copies. Also enclosed is an original and one copy of a Proof of Service. Please file the original. Please conform and return the remaining copies of the motion and opposition and the remaing copy of the Proof of Service in the enclosed self-addressed, stamped envelope.

If there is any question or difficulty, do not hesitate to contact me at 925-335-8088. After August 31, 2006, any communication regarding this case should be directed in the first instance to Ellen Leonida at 925-335-8036.

Very truly yours,

Ron Boyer
Deputy Public Defender

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In The
Supreme Court of the United States

GLORIA ALLRED and ALLRED, MAROKO & GOLDBERG,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF CONTRA COSTA,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA, and DEFENDANT SCOTT EDGAR DYLESKI,

Real Parties in Interest.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case squarely presents an issue of profound importance under the First Amendment that has never been addressed by this Court and which splits the Circuits and the state courts: when may trial courts impose prior restraints on lawyers' speech about pending cases?

On countless occasions, this Court has stressed that "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980) (emphasis in original; quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). This Court and its Justices have often repeated, in many distinct contexts, their abhorrence of prior restraints on speech. *See, e.g., Nebraska Press Ass'n*, 427 U.S. 556, 589 (1976) (describing the "deep-seated American hostility to prior restraints"); *New York Times Co. v. United States*, 403 U.S. 713-14 (1971) (declaring strong presumption against prior restraints); *Bantam, supra*, 372 U.S. at 70-71 (listing cases striking down prior restraints); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 706 (1931) (rejecting injunction on future publication of newspaper despite publisher's previous dissemination of defamatory material).

Notwithstanding this consistent disapproval of court orders preventing speech, lower courts across the country are now routinely approving prior restraints in high profile cases in the form of gag orders on speech by lawyers and trial participants. *See State ex rel. Missoulian v. Montana Twenty-First Judicial Dist. Court*, 933 P.2d 829, 845 (Mont. 1997) (Nelson, J., dissenting) ("there has been a proliferation of orders restraining trial participants as a means of indirectly restraining the press. . . . Indeed, this trend has accelerated because of highly publicized cases."); C. Thomas Dienes,

Trial Participants in the Newsgathering Process, 34 U. RICH. L. REV. 1107, 1109 (2001) ("there has been an increasing use of broad, sweeping judicial gag orders on trial participants, including lawyers"); Douglas E. Mirell, *Gag Orders & Attorney Discipline Rules: Why Not Base the Former Upon the Latter?*, 17 LOY. L.A. ENT. L. REV. 353, 353 (1997) ("With increasing frequency, judges throughout the United States are imposing (or threatening to impose) ever-more Draconian forms of prior restraints upon the out-of-court statements of attorneys and other trial participants.")

This proliferation of prior restraints on the speech of attorneys and trial participants has occurred because this Court has never decided a case concerning their constitutionality. As the Texas Supreme Court explained: "Neither *Nebraska Press* nor any other ruling of the United States Supreme Court has specifically considered such an order. Indeed, there is a confusing split of federal authority on this matter. The end result has been an increase in the number of gag orders on parties to ongoing litigation." *Davenport v. Garcia*, 834 S.W.2d 4, 11 n.20 (Tex. 1992).

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), this Court considered when lawyers may be punished *after* their speech. No gag order was placed on Gentile's speech and none was considered by this Court, No Supreme Court case ever has decided the standard to be used in determining whether a gag order may be imposed on the speech of lawyers and trial participants.

In the absence of guidance from this Court, three conflicting approaches have emerged, with some circuits and states following each. As a federal district court recently explained: "A three-way circuit split exists with respect to . . . the threshold standard for imposing a prior restraint." *United States v. Carmichael*, 326 F.Supp.2d

1267, 1293 (D.Ala. 2004). As explained below, some Circuits and states allow prior restraints, as did the trial court in this case, upon finding that there is a reasonable likelihood of prejudicing an adjudicatory proceeding. Appendix to Petition for Certiorari ("App.") at 7. Other Circuits and states require that there be a substantial likelihood of prejudice. Still other Circuits and states require that there be a showing of a "clear and present danger" of prejudice and apply strict scrutiny.

Contrary to the State's assertion, this is not just a "difference in semantics." State of California's Brief in Opposition to Petition for Certiorari ("State Br. Opp.") at 5. This is essentially a split over whether the test for prior restraints on lawyers and trial participants should be rational basis review, intermediate scrutiny, or strict scrutiny. It is essential that this Court grant review to resolve this issue of great national importance.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE, WHICH HAS DIVIDED THE FEDERAL AND STATE COURTS, CONCERNING WHETHER AND WHEN GAG ORDERS MAY BE IMPOSED ON ATTORNEYS PREVENTING THEIR SPEECH ABOUT PENDING CASES.

A. The Circuits and State Courts Are Split As To The Appropriate Test To Apply In Determining Whether To Impose A Prior Restraint On The Speech Of Lawyers And Trial Participants.

As explained in the Petition for Writ of Certiorari, three distinct, conflicting approaches have emerged among the federal circuits and the states as to when gag orders may be placed on lawyers and trial participants. The

Sixth, Seventh, and Ninth Circuits and some states allow gag orders on lawyers only if there is a "clear and present danger" to providing a fair adjudicatory proceeding and essentially require that strict scrutiny be met. *United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987); *Levine v. United States*, 764 F.2d 590, 595 (9th Cir. 1985); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975); *Twohig v. Blackmer*, 121 N.M. 746, 749 (N.M. 1996); *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 244 (Ill. 1986).

In contrast, the Second, Fourth, and Tenth Circuits and some states allow gag orders if there is a "reasonable likelihood" of prejudice. *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999); *In re Application of Dow Jones & Co.*, 842 F.2d 603, 610 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); *United States v. Tijerina*, 412 F.2d 661 (10th Cir. 1969); *State v. Bassett*, 128 Wash.2d 612, 616 (1996); *National Broadcasting Co. v. Cooperman*, 116 A.D.2d 287, 292 (N.Y. App. Div. 1986). This is the approach taken by the trial court in this case in approving the gag order on the speech of the lawyers and trial participants. App. at 7.

Yet a third approach, focusing on whether there is a "substantial likelihood" of prejudice, is followed in the Third and Fifth Circuits. *United States v. Scarfo*, 263 F.3d 80, 94 (3d Cir. 2001); *United States v. Brown*, 218 F.3d 415, 425 (5th Cir. 2000).

It is hard to imagine a clearer split among the Circuits and states than this. Respondent State of California makes two responses. First, it says that this difference is "mere semantics." St. Br. Opp. at 5. But as many of these lower court decisions have recognized, there is an enormous difference between a "reasonable likelihood" test, a "substantial likelihood" test, and a "clear and present danger" test. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F.2d at

249 (reasonable likelihood standard is not sufficient to meet the requirements of the First Amendment and clear and present danger standard should be used); *United States v. Brown*, 218 F.3d at 428 ("the 'clear and present danger' test cannot be the appropriate standard by which we evaluate gag orders imposed on trial participants. Instead, the standard must require a lesser showing of potential prejudice.")

Second, the State contends that there is not a conflict among the lower courts since this Court's decision in *Gentile*. This is just false. *Gentile* involved the standard to be applied when an attorney may be disciplined *after* speaking. It did not involve and did not consider the appropriate standard for prior restraints on speech by attorneys and trial participants. Thus, it did nothing to resolve the split in authority and the use of differing approaches continues. For example, the Fifth Circuit, a decade after *Gentile*, noted "[o]ur sister circuits have not reached a consensus on this question" of when gag orders are constitutionally permissible. *United States v. Brown*, 218 F.3d at 425. Just two years ago, a federal district court expressed uncertainty over the test because there is a "three-way circuit split as to . . . the threshold standard for imposing a prior restraint." *United States v. Carmichael*, at 1293. In fact, there are cases using each of the three approaches in the years since *Gentile*. *See, e.g., Twohig v. Blackmer*, 121 N.M. 746, 749 (N.M. 1996) (using the "clear and present danger" test); *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999); *State v. Bassett*, 128 Wash.2d 612, 616 (1996) (using "reasonable likelihood" test); *United States v. Scarfo*, 263 F.3d 80, 94 (3d Cir. 2001); *United States v. Brown*, 218 F.3d 415,425 (5th Cir. 2000) (using "substantial likelihood" test).

This Court needs to grant review to resolve this split and provide desperately needed guidance as to when gag orders on lawyers and trial participants are permissible.

B. This Case Provides An Ideal Vehicle For This Court To Decide This Issue Of National Importance.

1. The issue of the appropriate standard for gag orders on lawyers and trial participants is clearly and directly presented.

This case presents an ideal opportunity to resolve this conflict among the circuit and state courts. The gag order on the attorneys and trial participants in this case is typical of those entered in high profile cases around the country. John Stevenson, *Attorneys Want Gag Order Lifted; Lacrosse Players' Lawyers Say 'Court of Public Opinion' Is Necessary for Justice*, HERALD-SUN (Durham, N.C.), July 22, 2006, at A1 (describing gag order in prosecution of Duke Lacrosse players); Patti Bond, *Scrushy Trial Unlikely To Be Dull; HealthSouth Founder Known As a Showman*, ATLANTA J.-CONST., Jan. 16, 2005, at D1 (citing a gag order in the trial of HealthSouth founder and former Chief Executive Officer, Richard Scrushy); Jeff Benedict & Steve Henson, *The Case Against Kobe Bryant Unraveled in a Mock Trial*, L.A. TIMES, Nov. 6, 2004, at A1 (describing the judge's order in the Kobe Bryant case as a "sweeping gag order"); *Judge Issues Gag Order in Peterson Case*, CHI. TRIB., June 13, 2003, at 16.

In fact, this case presents a particularly important vehicle for deciding this issue. The attorney in this case, Ms. Allred, was representing a potential witness and not a party. Unlike counsel for the parties, Ms. Allred is not privy to any inside information about the case or its evidence, apart from her client's potential testimony and she already had agreed not to comment on that.

Respondents focus on the fact that Ms. Allred at times also serves as a media commentator. St. Opp. Br. at 10; Dyleski Opposition to Petition for a Writ of Certiorari ("Dyleski Opp. Br.") at 12-14. But surely Ms. Allred does not have less First Amendment rights just because she exercises her right to freedom of speech.

Also, the prior restraint on Ms. Allred's speech kept her from discussing misconduct by police and prosecutors in the way in which her client was treated. Speech critical of government misconduct "has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990). But any public statement by Ms. Allred which criticized the actions of government officials and accused them of misconduct with respect to Ms. Allred's client, a potential witness, would be a violation of the Protective Order.

2. Although the trial in this case has ended, the case is not moot because this is a classic "wrong capable of repetition, but evading review."

The State argues that certiorari should be denied because the case is moot since the trial has ended in a verdict and the gag order has been lifted. St. Opp. Br. at 8.* This case, though, presents a classic "wrong capable of repetition, but evading review" precisely because such gag orders are always of limited duration and inevitably expire

* Respondent Dyleski also argues that Ms. Allred lacks "standing" because the trial court applied the standard she urges. Dyleski Opp. Br. at 9-10. However, Ms. Allred unquestionably has standing because she was injured in that her speech was enjoined. Moreover, as explained above, the trial court did not use the standard urged by Ms. Allred; it used a reasonable likelihood test which is not nearly protective enough of speech to meet First Amendment muster.

before this Court has the opportunity for review. *See, e.g., Southern Pac. Terminal Co. v. ICC*, 219 U.S. 408, 514-15 (1911) (allowing a challenge to an Interstate Commerce Commission order that had expired because the Court concluded that consideration of such orders should not be defeated, "as they might be, . . . by short term orders, capable of repetition, yet evading review.")

In fact, this Court frequently has reviewed judicial orders limiting speech about pending cases after the trials have ended on the grounds that such orders are wrongs capable of repetition but evading review. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. at 546-47 (allowing review of judge's order imposing gag order on press preventing pretrial reporting even though the order had ended); *see also, Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982) (allowing review of exclusion from trial of victim of sex crime who was under age 18 after trial was completed); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979) (allowing review of exclusion from pretrial hearing after its completion). As the Court explained in *Nebraska Press*, in deciding the constitutionality of a gag order imposed on the press even though the trial was over: "Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, . . . since these orders are by nature short-lived. We therefore conclude that this case is not moot, and proceed to the merits." *Nebraska Press Ass'n*, 427 U.S. at 547.

The issue of gag orders on lawyers and trial participants is likely to occur over and over again, but always evade review because the trials inevitably will be over before the Supreme Court can hear the case. Moreover, as Respondents emphasize, Petitioner Gloria Allred is a

frequent media commentator who often represents witnesses in high profile cases. This makes it very likely that she personally will face this issue again.

3. The gag order in this case is unconstitutional.

Both of the briefs in opposition to certiorari focus on defending the gag order in this case. But both briefs ignore key reasons why the gag order is clearly unconstitutional. Never in American history has this Court upheld a court order preventing speech. This prior restraint is especially suspect because it prevents speech about court proceedings and the conduct of government officers. This Court has recognized that "[i]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

The trial court in this case imposed a gag order on a finding that there was a "reasonable likelihood" that the pretrial publicity would prevent a fair trial. App. at 7. It is impossible to reconcile a "reasonable likelihood" standard with this Court's consistent statement of a strong presumption against prior restraints. Moreover, this Court's decision in *Gentile* rather than supporting the gag order, as Dyleski and the State claim, shows why the trial court erred. In *Gentile*, this Court held that a lawyer may be disciplined after speaking if there was a showing that the speech had a "substantial likelihood" of materially prejudicing an adjudicatory proceeding. The standard for a prior restraint surely must be at least as stringent, if not more so, than that used for after-speech punishment. It is well established that the First Amendment "accords greater protection against prior restraints than it does against subsequent punishment for a

particular speech[.]" *Nebraska Press Ass'n*, 427 U.S. at 589 (Brennan, J., concurring).

Also, after *Gentile*, Ms. Allred, and all lawyers, know that their speech can be punished if it is prejudicial. The trial court here made no findings that the prospect of such discipline was not sufficient and why a broad prior restraint was needed.

Respondents emphasize the publicity surrounding the trial. *See, e.g.*, State Opp. Br. at 8-10. But this Court has been clear that pretrial publicity, even extensive pretrial publicity, does not automatically risk undermining a fair trial. This Court stated that "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Nebraska Press Ass'n*, 427 U.S. at 565. The trial court in this case made no findings as to why Ms. Allred's speech was likely to present a clear and present danger, let alone a substantial likelihood or even a reasonable likelihood of preventing a fair trial.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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